be rendered necessary and convenient to the defendant in properly transacting the ordinary business for which it was organized. If so necessary to the accomplishment of the proper objects of its creation, and the successful transaction of its ordinary business, we think the ownership and control of a steamboat for that purpose would be within the powers incidental and express conferred upon the defendant by the act.

If the views expressed are correct, and we have no doubt they are, it follows that the facts alleged as to the control of the steamboat by defendant are legally possible, and the truth of the allegations is admitted by the demurrer. We think the court erred in sustaining the demurrer.

Judgment reversed, with directions to the District Court to vacate the order sustaining the demurrer, and permit defendant to answer upon the usual terms.

Supreme Court of Arkansas.

MARY H. BOWMAN *v.* ELISHA WORTHINGTON.

Alimony has no existence at common law as a separate and independent right, but only as an incident to a proceeding for some other purpose.

There is no inherent jurisdiction in a court of chancery to grant alimony.

A divorced wife, having married again, is not entitled to alimony from her first husband.

The Circuit Courts of Arkansas have jurisdiction of divorce and alimony, but the latter is incidental to the former and cannot be granted in a separate suit where it is the only relief sought.

APPEAL from the Chicot Circuit Court in Chancery.

Appellant, who was also plaintiff below, married respondent in 1840, in Kentucky, and resided afterwards in Arkansas for a short time, when, in consequence of his adultery, she left him and returned to Kentucky, where in 1843 she was divorced by a special Act of the legislature of that state. In 1847 she married Bowman, who died in 1854.

In 1866 she commenced this suit for alimony from her first husband, and set forth the foregoing facts in her bill. Defendant demurred specially for the following reasons, among others:—

1st. That the power of the Circuit Court to grant alimony, depends entirely on the statute, by which alimony is dependent

upon and incidental to a divorce from the bonds of matrimony, granted by the same court.

2d. That the marriage had been annulled by the Act of the Kentucky legislature, and that alimony can only be awarded to a wife, *as such*, out of the property of her husband *as such*, in virtue of a subsisting marriage *status*, and that after a divorce granted, the court could have no jurisdiction of a bill for alimony.

3d. That the complainant married a second time—that would have revoked alimony, if it had been already granted—and so created a bar to the relief sought.

The demurrer was sustained and the bill dismissed, whereupon plaintiff appealed

Pike & Adams, for appellant.

Garland & Nash and *W. H. Sutton*, for appellee.

The opinion of the court was delivered by

CLENDENIN, J.—The questions raised have never been decided by this court. Owing to the peculiar jurisdiction of the English courts upon this subject until the year 1858, we have not been able to find that light and information which we generally find, to aid us in our judgment, in the adjudications made by the great and learned of the profession in the country from which we get the foundation of most of our law. Nor have we found many cases in the American courts where the same points as in this were before the courts, and adjudicated by them. The application in this case is for alimony. We do not understand the bill to pray for anything else.

By our Statute of Divorce, chap. 59, Digest, jurisdiction in divorce and matrimonial causes, including alimony, is conferred upon the Circuit Court, sitting as a Court of Chancery. The statute is an original provision, no part of the English ecclesiastical law having been expressly adopted in this state. Where by statute jurisdiction over particular subjects of equity is conferred, or given to common-law courts, the entire body of laws administered in the equity courts of this country attaches to the matter immediately on the jurisdiction being created. But the subject of divorce, and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction. Courts of equity in England did not exercise jurisdiction over

them. They were confined to the Ecclesiastical Courts—they alone adjudicated upon them. During the Commonwealth the Ecclesiastical Courts were abolished, and the Courts of Chancery, for a time, in virtue of special authority, given in their commissions, took jurisdiction of the causes; but after the Restoration, an Act of Parliament, confirmatory, was passed to justify this assumption of jurisdiction.

The Ecclesiastical Courts in England retained exclusive jurisdiction of divorce and matrimonial causes until the 20th and 21st year of Victoria: by Act of Parliament the jurisdiction was transferred to a new court, styled, "The Court of Divorce and Matrimonial Causes."

The Circuit Courts of this state, sitting as Courts of Chancery, have jurisdiction of all cases of divorce and alimony by virtue of the statute. The court in cases of this kind must look to and be governed by the statute. It has no other power than those expressly conferred; and while it may sit as a Court of Chancery, it is not to be understood as exercising inherent chancery powers, but as a court limited and guided by express statutory provision over a subject-matter never belonging to chancery jurisdiction. It is then the Circuit Court, invested expressly by statute with authority to investigate and try cases of this kind, by rules of proceeding adopted and practised in Courts of Chancery.

The question then arises, has the Circuit Court, sitting as a Court of Chancery, jurisdiction to grant the relief prayed for and decree alimony? Our statute points out the court that can entertain the jurisdiction. It not only locates the jurisdiction, but it details the manner, the time when, and the circumstances under which, and the causes for which, alimony may be adjudged.

The first section of our statute, chap. 59, Digest Arkansas, enumerates the causes for which a divorce may be granted. The third section says: "The Circuit Court, sitting as a Court of Chancery, shall have jurisdiction in all cases of divorce and alimony, or maintenance, and like process and proceedings shall be had in said cases as are had in other cases on the equity side of the court, except that the answer of the defendant need not be under oath."

The fourth section defines the necessary qualifications of the bill of complaint, and the ninth section provides: "That when a decree shall be entered, the court shall make such order touching

the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable;" and in the eleventh section it is enacted: "That the Circuit Court shall have power also to enforce the performance of any decree or order for alimony and maintenance, by sequestration of the defendant's property, or by such other lawful ways and means as are according to the rules and practice of the court."

Alimony is the allowance which a husband, by order of the court, pays to his wife living separate from him, for her maintenance: Bishop 549.

This definition is substantially the same as that given by other American and the English authorities, and may be said to be only applicable to divorces *a mensa et thoro*, because it presumes the relation of husband and wife still to exist, although the parties are separated by virtue of the decree of a competent court, and is peculiarly applicable to the divorces granted by the courts in England prior to the year 1858, for, in England previous to that year, no judicial divorces dissolving the bonds of matrimony, originally valid, were allowed.

The allowance of alimony may be for the use of the wife, either during the pendency of suit, in which case it is called alimony *pendente lite*, or after its termination, called permanent alimony. It has no common-law existence as a separate, independent right, but wherever found, it comes as an *incident to a proceeding for some other purpose*, as for divorce, no court in England having any jurisdiction to grant it where it is the only thing sought: Bishop on Marriage and Divorce 550, and the authorities cited.

As we have before suggested, we have been able to find but few adjudications upon a point similar to the one we are now considering. In the case of *Shottwell* v. *Shottwell*, 1 Sm. & M. Chan. Rep. 51, which is a case and application similar to the one before us, except that there had been a judicial decree of a competent court of the state of Mississippi, dissolving the bonds of matrimony, the chancellor says: "That a separate suit by bill or petition may be maintained for alimony after a decree for a divorce in which such claim was omitted, if there was no express act of the wife waiving her right thereto." But this opinion of the chancellor was, we think, subsequently overruled by the Supreme Court of Mississippi, in the case of *Lawson* v. *Shotwell*,

27 Miss. Rep. 631 (and which appears to be a branch of the case of *Shottwell* v. *Shottwell*). The Supreme Court, in alluding to the decree for divorce that had been granted, and its effect and operation, say: "The Constitution authorizes the legislature to give the Circuit Courts equity jurisdiction in all cases whereof the thing or amount in controversy does not exceed $500; also in all cases of divorce and for the foreclosure of mortgages."

The legislature by the Act of March 2d 1833, organizing the Circuit Courts, among other things, declares in the language of the constitution, in defining the equity jurisdiction of these courts, that it shall extend to cases of divorce, &c. The court further say, "the question then comes up for decision, whether the law, by investing the Circuit Courts with full power to decree a divorce, intended that the court might go further and decree alimony, or an allowance to the wife out of the husband's property. The authorities on this subject, almost without exception, agree that alimony is allowed only as an incident to some other proceeding, which may be legally instituted by the wife against the husband as such, for instance, as an action for the restitution of conjugal rights, divorce, &c.; in which cases temporary alimony is allowed pending the suit, and permanent alimony on rendering the final decree in a divorce case in favor of the wife;" and the court again say that, "Having decided, then, that the jurisdiction of the Circuit Court was full and complete in the divorce case, as to the matter now in controversy, at least so far as the claim for alimony is concerned, and the complainant having failed to ask a decree in this respect, the question is, whether the present bill shall be entertained by the Superior Court of Chancery. While equity inclines at the proper time and in the proper case to administer justice on a liberal scale in favor of an injured wife, against a guilty husband, yet it can dispense with none of those salutary rules constituting part of the system in her favor, any more than in the cause of a less favored party. Matters which appropriately belong to the case in the Circuit Court, and which might by ordinary diligence have been embraced in its decree or final action, ought not upon principles of policy to be again litigated between the same parties in another court;" and the court, after saying that the bill cannot be entertained, say: "We do not intend to intimate that there may not be cases in which an original bill, after a decree for a divorce, could not be maintained.

A good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason must depend upon the facts of the case when presented."

Another case is *Richardson* v. *Wilson*, 8 Yerg. 67. Wilson, the husband, presented to the legislature of Tennessee a petition for divorce without the knowledge of his wife, and the legislature passed an act divorcing the parties, which act contained a proviso, "That nothing in this act shall deprive the said Mary Ann of her right to alimony, if by law she is entitled to the same." The wife brought her bill for alimony, and Wilson defended, armed, as he supposed, with the weapon he had himself procured from the legislature; but the court decided that it cut both ways—that while it cut him loose from the bonds of matrimony, it carved out of his estate a maintenance and support for her who had been his wife; intimating also, that even without the proviso to the act, the court would have maintained her right to alimony.

Justice PECK (concurring with Chief Justice CATRON, who had delivered an opinion), in an opinion replete with interest, says: "If the legislature have, while the Act of 1799 was in force, stepped in the place of judicial authority and granted the divorce, cannot the courts of justice take up the cause exactly where the legislature left it, and make inquiry as if the divorce had been then and there granted by the court?"

We are not advised what are the particular features of the Act of 1799 of Tennessee, under which the court acted, so as to be able to compare it with the provisions of our own statute, under which we are called to decide.

We have also been referred to the case of *Fischli* v. *Fischli*, 1 Blackford 360, as in point, to strengthen the position, that a bill for alimony, as a separate claim, cannot be maintained; but as we have not been able to procure the volume referred to, we can only refer to it as we find it—alluded to approvingly by Mr. Bishop, in his well-considered work on Marriage and Divorce.

The only direct decision upon this point we have been able to procure, made by the English courts since the passage of Act 20 & 21 Vict., establishing a court for Divorce and Matrimonial Causes, is *Winston* v. *Winston & Dyne*, 3 Swabey & Tristram's Rep. 245; and from the section of the law given in the opinion, it will be seen that it is like our statute, a law giving to a court jurisdiction in certain and specified cases. The case was a peti

tion for permanent alimony after a decree for dissolution. The 32d section of the law by which the court acquired jurisdiction to decree alimony, is, "The court may, if it shall think fit, on any such decree (*i. e.*, for dissolution of marriage), order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as, having regard to the fortune, if any, to the ability of the husband, and the conduct of the parties, it shall deem reasonable," after referring to the circumstances in the case.

The Judge Ordinary says: "This is a novel attempt with respect to permanent alimony; anything in the nature of permanent alimony in a case of dissolution of marriage is the creature of the 32d section of the Divorce Act. I cannot think that the 32d section intended that after a decree nisi of dissolution obtained against the wife, she shall be at liberty to file her petition for alimony."

Bishop, in his work on Marriage and Divorce 553, 554, after referring to some of the courts that had maintained the chancery jurisdiction to grant alimony, says: "The inherent jurisdiction to grant alimony is also acknowledged in Virginia, Kentucky, in South Carolina, and in Alabama," referring to cases in those states. But he says these are exceptions to the general rule, and departures likewise from principle.

"In some of the other states the jurisdiction has been expressly denied, in some others by necessary implication, and probably it could not now be established in any state where it had not already been maintained, though there is some strength of argument, and some apparent weight of authority in favor of the jurisdiction."

From the views thus given and the authorities we have examined, we have come to the conclusion that alimony being an incident to the divorce, by the peculiar phraseology of our statute, the courts of this state can only so grant it, and that in connection with the decree for divorce, and that the Circuit Court has not jurisdiction to entertain a separate application for alimony.

We have arrived at this conclusion with some reluctance, for we would have preferred, if we could have done so consistently with our views of the law, to have favored the jurisdiction, that

the complainant might have got the relief she asked; but we believe she is now without the remedy she might have availed herself of at the time she was compelled by the conduct of her husband to leave him.

In 1841, when she left her husband, the same law was in force that is in force now, and she could have availed herself of it, and got such relief as the law and the courts can give in such cases; she then had a right and a remedy to enforce her right, but she thought proper to resort to a tribunal in her native state, and it granted her what she asked—to be released from an unkind and adulterous husband, and to be restored to her maiden name.

But should we be mistaken in the view we have taken of this point in the case, there is another raised by the bill and demurrer, which we think would defeat the application.

The bill shows that the complainant was divorced by the legislature of Kentucky in 1843, and that in 1847 she married Benjamin H. Bowman, who died in 1854, and that she is now the widow of Bowman. In this state of facts, and taking the broadest definition of alimony, that it is that portion of the estate of the husband which the court allows to the wife on her divorce from him, for her support and maintenance, can we say that she is now entitled to such support and maintenance? She is the widow of Bowman, and as such entitled to dower in his estate. If she is entitled to alimony now, she would have been so in 1847 after her second marriage, and if suit had been brought in his lifetime, he must have joined his wife in such suit, and the second husband and his wife would prosecute the first husband for the maintenance and support of the wife. We do not suppose the law ever contemplated or would encourage such a proceeding. By the contract of marriage, the husband assumes the obligation to support his wife. It is his duty to do so, and the law will enforce the duty, and although the bonds of matrimony be dissolved, still if the wife claims it in proper time, and before the proper tribunal, the law will enforce her claim. But when the wife seeks a divorce *a vinculo*, and marries again, she fixes upon the new husband the obligation to support her. If the complainant in this case had presented her application for divorce and alimony under our statute, and she had been divorced and alimony assigned to her, and she had again married, we have no doubt it

would have been in the power of the court that granted the divorce and allowed the alimony to have ordered its payment to cease, and upon this point, and the effect of a second marriage, we have the light of direct adjudications.

In the case of *Albee* v. *Wayman*, 10 Gray 222, a divorce *a vinculo* and alimony had been decreed. Mrs. Wayman married again, and in consequence of that marriage, the court say, "the application for a divorce and alimony was her own affair, a voluntary act of hers instituted for her benefit; so long as she remained unmarried, no ground existed for lessening the amount of such alimony, while, of course, it was open to her application for increase for good cause. By her act of subsequent marriage, she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of the alimony," and it was reduced to a nominal amount.

In the case of *Fisher* v. *Fisher*, 2 Swabey & Tristram's Rep. 411, the court say: "If hereafter the petitioner (who had petitioned for divorce and alimony) should become guilty of immorality, it would be unreasonable to call upon the former husband to maintain her. Again, if she avails herself of the freedom conferred by the decree of this court, and marries again, it would be unreasonable to compel the former husband to support her." And again, in the case of *Sidney* v. *Sidney*, 4 Swabey & Tristram's Rep. 180, the same principle is announced.

These authorities we think to be in accordance with the law, with propriety and good sense, and we therefore hold, because of the second marriage, the complainant in this case is not entitled to have maintenance and support decreed to her from her first husband; and having disposed of the case upon the two points considered, we deem it unnecessary to consider or decide upon the others made by the demurrer.

The decree of the Circuit Court dismissing the bill is affirmed.